The Hoosier Environmental Council
3951 N Meridian, Ste. 100
Indianapolis, IN 46208

Legal Environmental Aid Foundation
150 Lincolnway, Suite 3002
Valparaiso, Indiana 46383

April 16, 2009

Compliance and Enforcement Response Policy
MP-005-R1_NPD
Nancy King
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46204
Fax: 317-233-2342

Re: MP-005-R1_NPD; Compliance and Enforcement Response Policy

Dear Ms. King:

Please accept these comments on behalf of the Legal Environmental Aid Foundation of Indiana, Inc. (LEAF) and the Hoosier Environmental Council (HEC) regarding the Nonrule Policy Document MP-005-R1_NPD, the Compliance and Enforcement Response Policy (CERP). LEAF is a non-profit environmental law practice providing *pro bono* legal services to Indiana's environmental activists and organizations. HEC is Indiana's largest state-wide environmental organization working to address Indiana's environmental challenges through education and advocacy. We are concerned with both the substance of this policy and the process by which it is being adopted as follows:

I. Substantive Concerns

a. The CERP is inconsistent with the purpose and intent of federal environmental law:

As you know, IDEM is the State agency designated and responsible "for all purposes of" the major federal environmental statutes including the CAA, CWA, CERCLA, RCRA and others. *See* Indiana Code § 13-13-5-1. Even cursory review of these statutes' legislative purposes reveal that they were enacted for protection of public health and environment. For example, Congress enacted the CAA "to *protect* and enhance the quality of the Nation's air resources so as to promote the *public health and welfare*." 42 USC § 7401 (emphasis added). Similarly, the CWA was enacted in part to restore and maintain the chemical, physical, and biological integrity of the nation's waters by *preventing* point and nonpoint pollution sources. 33 USC §1251, et. seq.

Indeed, USEPA guidance on the agency's Core Enforcement and Compliance Assurance Functions recognizes that "*protecting* public health and the environment" is accomplished in part by putting "an immediate stop to illegal activities that pose *actual* or *potential* harm to public health or the environment."[1]

Consistent with this legislative intent, IDEM's Enforcement Referral Plan (ERP) of February 5, 2003, which the CERP replaces, required "*immediate* referral" to enforcement for the most egregious, "Class I violations" that result in an "*actual* or *potential* threat to human health or safety or . . . serious *actual* or *potential* impact to the environment." However, the words "actual" and "potential" are removed from this exact language set forth in §6.2.1(A)(1)(a) and (g) of the CERP. Because there is no difference between a "threat" or "impact" and an "actual threat" or "actual impact" removing the word "actual" does not change the meaning of these provisions. However, there is a difference between a "threat" or "impact" and a "potential threat" and "potential impact." Thus, removing the word "potential" from §6.2.1(A)(1)(a) and (g) renders these Class 1 violations resulting in *potential* threats to human health or safety or *potential* impacts to the environment somehow less egregious Class 2 violations under §6.2.1(B)(1)(a) of the CERP triggering a less vigorous agency response.

In addition, under §6.2.1(A)(1)(b) of the CERP, performing "a regulated activity without the proper license or certification" is no longer considered a Class 1 violation unless such activity "results in a threat to human health or the environment." Requiring additional proof of harm undermines USEPA Policy on Timely and Appropriate Enforcement Response to High Priority Violations of the federal Clean Air Act. Specifically, that policy requires formal enforcement to be initiated within 60 days for "high priority violations" including: failures to obtain proper permits, violations of permit limits, orders, and consent decrees, testing, monitoring, record keeping or reporting violations that substantially interfere with enforcement or compliance determinations, and illegal activity by recalcitrant violators regardless of whether such violations result in any threat to human health or environment at all.[2] Indeed, under the prior ERP, IDEM considered these same illegal activities to be Class I violations requiring immediate referral to enforcement without any contingency that they result in any harm whatsoever.

IDEM is certainly aware that emission standards, effluent limits, permitting and reporting requirements are presumed reasonable and necessary for protection of public health and environment. Indeed, strict liability is imposed for most civil violations of environmental statutes and regulations to meet the Acts' purpose of protecting public health and environment. *See U.S. v. J & D Enterprises of Duluth,* 955 F.Supp. 1153, 1158 (D.Minn.,1997); *U.S. v. Tzavah Urban Renewal Corp.*, 696 F.Supp. 1013, 1020 (D.N.J.,1988). Moreover, it is well established federal and state law that "irreparable harm" is demonstrated by the statutory violation itself. The rule is well articulated in *Department of Financial Institutions v. Mega Net Services* by the Indiana Appellate Court:

> It is well settled that where the action to be enjoined is unlawful, the unlawful act constitutes *per se 'irreparable harm'* for purposes of the preliminary injunction analysis. When the *per se* rule is invoked, the trial court has determined that the

[1] *See* www.epa.gov/compliance/resources/policies/state/compasr-func-mem.pdf.

[2] *See* www.epa.gov/compliance/resources/policies/civil/caa/stationary/issue-ta-rpt.pdf.

> defendant's actions have *violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm* or whether the plaintiff will suffer greater injury than the defendant.
>
> 833 N.E.2d 477, 485 (Ind. App. 2005) (emphasis added).

These legal principles demonstrate why IDEM need not and should not require additional proof of harm in §§6.2.1(A)(1)(a),(b) and (g) for these illegal activities to be deemed Class 1 violations. Doing so de-emphasizes the need and use of enforcement in situations where it is critically needed for deterrence and required by federal law for protection of public health and environment.

b. The CERP gives full enforcement discretion to a political appointee without any provision for automatic, formal enforcement action for Class 1 violations

IDEM's prior ERP required "*immediate referral* to OE [Office of Enforcement] . . . by program staff, regardless of the efforts by the responsible party or IDEM staff to achieve compliance" for all Class I violations. (emphasis added). In sharp contrast, the CERP directs "immediate referral to the program Assistant Commissioner *for consideration of initiation of the formal enforcement process*" for Class 1 violations. (emphasis added). Moreover, the CERP provides in all situations that all violations will be referred to enforcement staff only when approved by the applicable program Assistant Commissioner. Thus, the CERP fails to establish any class or type of violation for which formal enforcement action is automatically required and gives full enforcement discretion to political appointees who may be improperly influenced by political considerations rather than by technical staff trained in these issues.

USEPA guidance emphasizes the importance of "national consistency in the implementation and enforcement of federal environmental requirements" to assure that "those regulated entities who violate environmental requirements do not gain a competitive advantage over those who comply with environmental laws."[3] Unfortunately, providing sole enforcement discretion to a political appointee will likely to lead to less consistent enforcement decisions rather than more due to political considerations that should have no bearing on the decision to enforce. In addition, transferring enforcement discretion from the program managers to Assistant Commissioners will require each case to go through three layers of management and compete for the Assistant Commissioner's time with other daily decisions. This is inefficient, ineffectual and undermines the ability of IDEM to take swift action when necessary for protection of public health and environment and to deter future violations.

II. Process Concerns

We are concerned about the process IDEM has used to develop this policy. The CERP dated March 2, 2009, purports to replace the policy of October 31, 2008. However, the October 2008 version was not presented to the environmental boards as required by IC 13-14-1-11.5 or made available for public comment. We also question the signatures on the March 2, 2009

[3] *See* www.epa.gov/compliance/resources/policies/state/compasr-func-mem.pdf

version. Indiana law requires that NRPDs be made available for public review and comment and presentation to the boards before being made final and effective, yet the Commissioner's signature on the document, dated March 2, 2009, suggests, at the least, that the Commissioner himself has made a final determination on the policy before that public review period has occurred and that the legally required reviews by the public and the environmental boards are symbolic rather than a meaningful opportunity for the agency to review input about the policy.

In addition, the agency made the revised policy very difficult for the public to review by not providing either a version that shows the changes between the 2003 policy and the CERP or a narrative explanation of the reason for the changes. This difficulty was exacerbated by the fact that the 2003 policy was not available on the agency website as required by IC 13-14-1-11.5. If the agency wishes to reconsider and change a prior policy, well and good, but it is fair to expect an explanation for those changes and how the revised policy will achieve the expressed goal—environmental compliance.

Attached to comments submitted by Improving Kids Environment (IKE), are suggested language changes for the definitions of Class I and Class II violations. We concur with those suggested changes and urge IDEM to incorporate them into the CERP.

We thank you for your consideration of these comments.

Very truly yours,

Jesse Kharbanda

Jesse Kharbanda, Executive Director
Hoosier Environmental Council

Kim E. Ferraro

Kim Ferraro, Executive Director
Legal Environmental Aid Foundation